UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DENNIS C. ROWELL,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-340-P-H***
	)	
MASSACHUSETTS CASUALTY	***)***	
INSURANCE COMPANY,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM

In this action which derives from a disability insurance policy, the plaintiff moves for summary judgment on the defendant's counterclaim[1] and the defendant moves for summary judgment on all of the plaintiff's claims. I recommend that the court deny the plaintiff's motion and deny the defendant's motion in part and grant it in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[1] While the plaintiff's motion for summary judgment (Docket No. 21) requests such relief on the entire amended counterclaim, by its terms it addresses only Count II of the counterclaim, which alleges breach of fiduciary duty, and I will address the motion with reference only to that claim.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The summary judgment record reveals the following facts, which appear to be undisputed.[2] Rowell owned an insurance agency in Gorham, Maine wherefrom he sold property and casualty insurance as a broker or agent for several insurance companies. Application, part of Exh. A to Defendant's Memorandum of Law in Support of Motion for Summary Judgment ("Defendant's Memorandum") (Docket No. 25); Affidavit of Veronica LaTour, Exh. A to Defendant's Statement of Material Facts Not Genuinely in Dispute ("Defendant's SMF") (Docket No. 28), ¶ 6 & attached list. In 1992 he sold the agency to O.I.A. New England, Inc. ("OIA") under an agreement which allowed him to continue to sell insurance through the agency. Exh. E to Defendant's Memorandum. Disputes arose between Rowell and OIA after the sale, culminating in litigation which was ultimately settled in November 1994. Settlement Agreement, Exh. L to Defendant's Memorandum.

On May 17, 1990 Rowell applied for a disability income policy from the defendant. Application. The sales agent listed on the application was Dan Havu, a new agent who worked with Rowell. Application; Affidavit of Dan Havu, Exh. D to Defendant's SMF, ¶¶ 3-4. The policy was issued on May 17, 1990. Policy, part of Exh. A to Defendant's Memorandum, at [2]. Rowell did not pay the premium due on this policy on August 17, 1993. Defendant's Billing Register, Exh. V to Defendant's Memorandum. In October 1989 Rowell saw a licensed clinical social worker four times in connection with a relationship problem, and this therapist referred him to a psychiatrist whom Rowell saw once in 1989 or 1990. Deposition of Sarah J. Bulley, Exh. K to Plaintiff's

[2] Counsel are reminded of their responsibility under Local Rule 56 to include all necessary facts in their respective statements of material facts. *See Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995). Although they have failed to do so here, I have chosen to extract the necessary additional facts from the summary judgment record solely for the purpose of setting forth the general factual circumstances of this case, but counsel should be aware that this court will not make a practice of doing so.

Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 31), at 32-33, 71; Exh. Y to Defendant's Memorandum, at 3; Letter of Maria C. Gaticales, M.D., and attached Mental Health Report, Exh. Z to Defendant's Memorandum. Rowell was hospitalized at Jackson Brook Institute on July 12, 1993. Jackson Brook Institute Records, Exh. G to Defendant's Memorandum, at [2]. He was discharged at his request the next day. *Id.* The discharge diagnosis was "Major Depression, Severe Single Episode Without Psychosis." *Id.*

Rowell filed a notice of claim under the policy on or about August 31, 1994. Letter of Laura Colasacco, Exh. E to Plaintiff's Opposition. He completed a formal claim on October 12, 1994. Disability Income Claim Form, Exh. M to Defendant's Memorandum, at [3]. The defendant denied the claim on the grounds that the policy had lapsed due to non-payment of the premium and that Rowell had not notified the defendant within 20 days of the date of loss, as required by the policy, and had not provided any explanation for the delay. Plaintiff's Opposition, Exhs. E & F. The policy includes a section entitled "Waiver of Premiums" that provides for waiver of payment of the premium during a period of total disability if the policy holder is totally disabled for a period of at least 90 days. Policy at 5.

III. Analysis

A. Judicial Estoppel

The defendant argues that Rowell is estopped from asserting that he was totally disabled when he failed to pay the premium due on the policy at issue in August 1993, thus making the policy void for nonpayment of premium, because he took the position in his 1994 litigation with OIA that he was in fact able to act as an insurance agent in 1993. Rowell counters that the expert retained by

the defendant to evaluate him, as well as the Social Security Administration, have found him to have been totally disabled since July 1993.

The doctrine of judicial estoppel "preclude[s] a party from asserting a legal or factual position 'inconsistent' with its position in a prior proceeding." *Gens v. Resolution Trust Corp.*, 112 F.2d 569, 572 (1st Cir.) (citation omitted), *cert. denied* 1997 WL 428541 (1997). "Judicial estoppel is not implicated unless the first forum *accepted* the legal or factual assertion alleged to be at odds with the position advanced in the current forum." *Id*. (emphasis in original). Rowell settled his claim against OIA before trial. Therefore, the Maine Superior Court could not have accepted any of his factual assertions in that action. While his assertions in that action, *see* Exhs. K & U to Defendant's Memorandum, do appear to be at odds with the position that he has taken in this litigation, that fact is not determinative for summary judgment purposes under *Gens*, the First Circuit's most recent statement on the applicability of judicial estoppel. *See also Unum Corp. v. United States*, 886 F. Supp. 150, 159 (D. Me. 1995) (in order for judicial estoppel to apply, litigant must have made a bargain with first tribunal by making certain representations in order to obtain a particular benefit from that tribunal). Rowell made no bargain with the Maine Superior Court. The defendant is not entitled to summary judgment on this basis.

B. Statute of Limitations

The defendant next argues that Rowell's claim is untimely under 24-A M.R.S.A. § 2739, which provides, in relevant part:

> No action shall be maintained on any policy to which this section applies [health insurance, which is defined to include disability insurance, 24-A M.R.S.A. § 704] and which has lapsed for nonpayment of any premium

> unless such action is commenced within 2 years from the due date of such premium.

Rowell responds that this action was filed within the three-year limitations period provided by the terms of the policy. I need not address the question whether the policy language or the statute prevails under the circumstances of this case, however, because the defendant's argument presumes that the waiver of premium clause in the policy is not applicable. That presumption cannot be maintained on the summary judgment record before the court.

The waiver-of-premium clause provides, in relevant part:

> A. TOTAL DISABILITY FOR 90 OR MORE SUCCESSIVE DAYS
> If total disability begins while this Policy is in force and it lasts 90 or more successive days, while you are so disabled we will waive the premium, or portion thereof, which applies to:
> (1) the first such 90 days;
> (2) the time after the first such 90 days, if any, until monthly benefits are payable;
> (3) the time for which monthly benefits are payable; and
> (4) the time beyond which monthly benefits are payable if during such time you are unable to do any gainful work because of such disability.
> * * *
> This Policy shall not lapse for non-payment of premiums which fall due during the period of waiver.

Policy at 5. The statutory language requires that the policy have lapsed for nonpayment of the premium. Here, Rowell contends that the policy did not lapse by its terms because he was totally disabled when the premium that was not paid in August 1993 was due, and that that period of disability extended more than 90 days.

Rowell also asserts that George N. McNeil, Jr., M.D., a psychiatrist who apparently evaluated him at the defendant's request, "found Mr. Rowell totally disabled pursuant to the policy from July 1993 to the present." [Plaintiff's] Statement of Disputed Material Facts (Docket No. 32) ¶ 13. The

citations to the record offered by Rowell in support of this assertion do not entirely do so. The portions of the transcript of Dr. McNeil's deposition submitted by Rowell as Exhibit G to Plaintiff's Opposition ("McNeil Dep.") reveal that Dr. McNeil stated that he thought that "a fairly good case could be made for [Rowell's] having been psychiatrically disabled," McNeil Dep. at 11, without any mention of a date of inception or the term of the disability, and that Dr. McNeil concluded that "at the time of his admission to Jackson Brook Institute it appeared that [Rowell] was -- he was very impaired. By his account, he really remained impaired significantly for a good long time after that; arguably, until he was treated by this Dr. Herrero in Florida . . . . Even with that, it was not entirely clear to me . . . that he was capable of performing his usual duties." *Id*. at 14. This is not determinative, undisputed evidence that Rowell was in fact totally disabled in August 1993 or that the disability continued to the time when he filed this action. It is sufficient evidence to avoid the entry of summary judgment against Rowell on the question of the applicability of the policy's premium-waiver provision, but nothing more.

The statute-of-limitations issue cannot be resolved until the waiver-of-premium issue is resolved. Such resolution is not possible based on the summary judgment record, and the defendant is therefore not entitled to summary judgment on this basis.

C. Rowell's Status as Agent of the Defendant

Rowell's motion for summary judgment on Count II of the counterclaim is based on an argument that he was not an agent of the defendant and therefore owed it no fiduciary duty as a matter of law. The defendant argues in support of its motion for summary judgment on the plaintiff's claims that Rowell was its agent and that his breach of fiduciary duty voids the policy

under which he seeks to recover as a matter of law.

For purposes of the defendant's motion, the court will assume *arguendo* that Rowell was its agent and did owe it some fiduciary duty. The evidence offered by the defendant to support its contention that Rowell breached this duty is that it "would have wanted to know about" Rowell's four visits with Sarah Bulley, a licensed clinical social worker, in 1989, and his pre-existing conditions of genital herpes and high cholesterol when it was underwriting the policy. Defendant's SMF ¶ 11; Deposition of Sarah J. Bulley, Exh. Y to Defendant's Memorandum, at 3; Treatment Notes, Exh. X to Defendant's Memorandum, at [1]-[5]; Medical Records, Exh. D to Defendant's Memorandum at [6] (12/2/85 annual examination); Deposition of William J. Hall, M.D., Exh. BB to Defendant's Memorandum, at 16-17. Rowell apparently does not dispute that he did not disclose any of these facts on his application for the policy at issue. Application at 2.

Rowell's expert witness, Robert L. Cross, a disability underwriter with 40 years experience, Affidavit of Robert L. Cross,[3] Exh. L to Plaintiff's Opposition, ¶ 5, opines that the omissions in Rowell's application did not constitute a misrepresentation of his medical status at the time of the application and that this information was not material to the underwriting of the policy, *id.* ¶ 7. A fiduciary "is obliged to fully disclose to the principal 'all facts within his knowledge which bear materially upon his principal's interests.'" *Goldberg Realty Group v. Weinstein*, 669 A.2d 187, 190 (Me. 1996) (citation omitted). As a practical matter, it is not possible to determine what was or was

[3] The affidavit of Mr. Cross, like every other affidavit in the summary judgment record, includes a jurat attesting that the statements made are true to the best of the affiant's knowledge, information and belief. There is no statement in the body of the Cross affidavit limiting his statements to his own personal knowledge. Counsel should not need to be reminded of the requirements of Fed. R. Civ. P. 56(e). To the extent that I rely on any facts set forth in the affidavits submitted by the parties, I rely only on those statements that demonstrate by their context that they are made upon the affiant's personal knowledge.

not disclosed on Rowell's application here because the parties do not specifically address this point in their statements of material fact. In any event, there is a dispute in the summary judgment record as to the materiality of the facts omitted from the application. The defendant is therefore not entitled to summary judgment on its claim that a breach by Rowell of his fiduciary duty renders the policy void.

Resolution of Rowell's motion for summary judgment on the counterclaim requires exploration of his argument that he was not the defendant's agent. If, as Rowell contends, he was not the defendant's agent when he applied for the policy at issue, his actions or omissions in connection with the application could not have breached a fiduciary duty running to the defendant. The parties address this issue as one of both statutory interpretation and common law. Under Maine law, a broker has no duty toward the insurer. *Carolina Cas. Ins. Co. v. Cummings Agency, Inc*., 110 F.3d 1, 2 (1st Cir. 1997). Rowell can thus be liable on Count II of the counterclaim only if he was the defendant's agent, and not merely an agent who, acting as an independent contractor, generates business for the defendant.

Under Maine common law, "[a]gency is the fiduciary relationship 'which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'" *Libby v. Concord Gen. Mut. Ins. Co.*, 452 A.2d 979, 981 (Me. 1982) (citation omitted). In support of his argument that he was not an agent of the defendant, Rowell offers the following evidence in his statements of material fact: (i) he had a written broker's agreement with Sun Life of Canada, Exh. C to Plaintiff's SMF; (ii) he did not have a written agreement with the defendant, Deposition of Douglas M. Mertz, Exh. F to Plaintiff's SMF, at 6; and (iii) he did not receive commissions from the defendant for sales of defendant's policies

but rather received such commissions from Sun Life, *id*. at 25. This is simply insufficient to establish as a matter of law that there was no manifestation of consent by the defendant for Rowell to act on its behalf, subject to its control, or that Rowell did not consent so to act. Rowell makes additional arguments in his memorandum in support of his motion, but those arguments are based on asserted facts that are not included in his statement of material facts. A party may not argue that he is entitled to summary judgment based on facts not properly presented in his statement of material facts. *Pew*, 161 F.R.D. at 1.

Accordingly, I conclude that Rowell is not entitled to summary judgment on the defendant's counterclaim.

D. Intentional Infliction of Emotional Distress

The defendant asserts that Rowell's claim for intentional infliction of emotional distress, set forth in Count II of the complaint, arises solely out of the actions which he alleges in Count I of his complaint constitute breach of the insurance contract. Such a claim, the defendant argues, is barred under Maine law. In the alternative, the defendant argues that Rowell will be unable to offer evidentiary support for all of the elements of a claim of intentional infliction of emotional distress.

Under Maine law, damages for emotional distress arising from the breach of an insurance contract do not lie in the absence of some accompanying physical injury, which is not alleged by Rowell. *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 651 (Me. 1993). An insurer's assertion of its policy defenses in a legally permissible way does not render it liable for emotional distress. *Chiapetta v. Lumbermens Mut. Ins. Co.*, 583 A.2d 198, 201 (Me. 1990). Thus, in order to avoid the entry of summary judgment in favor of the defendant insurer on Count II, Rowell must

demonstrate that it engaged in independently tortious conduct beyond the denial of his claim. *Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 616 (Me. 1996).

The complaint alleges that the intentional infliction of emotional distress by the defendant was accomplished by

> [taking] advantage of Plaintiff's condition and [misrepresenting] the terms of the policy in an attempt to convince PLAINTIFF not to pursue his claim for disability benefits. Even after PLAINTIFF asked for and agreed to pay for a copy of his policy, DEFENDANT intentionally refused to provide the same to PLAINTIFF misrepresenting the availability of a copy of the policy.

Complaint (Docket No. 1) ¶ 24. Rowell's Statement of Disputed Material Facts adds the following facts which may be considered in connection with this claim: (i) the defendant's handling of Rowell's claim violated company policy and procedures as set forth in Exhibit Q to Plaintiff's Opposition; (ii) the defendant did not send Rowell documents upon which to file his proof of loss after receiving his notice of claim until he had requested them several times; (iii) the defendant did not inform Rowell that it had determined he was not disabled at the time the policy lapsed; and (iv) the defendant did not inform Rowell about specific terms and specific policy language. *Id*. at ¶ ¶ 19-23.

Assuming *arguendo* that a failure to provide information to a claimant may cause emotional distress, as opposed to an affirmative act, the specific instances alleged by Rowell all appear to be necessarily tied to the defendant's denial of his claim, rather than independent of that denial. Even if that were not the case, the only evidence offered by Rowell that the emotional distress which he claims to have suffered as a result of this conduct was severe is that he suffered anxiety, had to undergo a deposition, and "lay awake nights wondering why the company didn't pay the policy that I had paid a premium with and bought coverage with when I became sick." Deposition of Dennis

C. Rowell, Exh. A to Plaintiff's Opposition, at 206. This evidence simply would not allow a jury to find the existence of emotional distress so severe that "no reasonable man could be expected to endure it," *Colford*, 687 A.2d at 616, as a matter of law. *See Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 155 (Me. 1979).

Rowell relies on *Rubin v. Matthews Int'l Corp*., 503 A.2d 694 (Me. 1986), to argue that he may recover damages for emotional distress in the contractual circumstances of this case, but the Law Court in *Marquis* specifically noted that an insurance contract is not one of the contracts, like that at issue in *Rubin,* for which such recovery is available. *Marquis*, 628 A.2d at 651. Rowell also relies on *Borden v. Paul Revere Life Ins. Co.*, 935 F.2d 370 (1st Cir. 1991), but that decision is based on Rhode Island law and a factual situation involving coercive actions forcing the plaintiff, who unlike Rowell was not an experienced insurance broker, to surrender a policy in exchange for one with inferior coverage. *Id.* at 372, 380-81. Each of these factors makes *Borden* distinguishable from the case at hand.

The defendant is entitled to summary judgment on Rowell's claim for intentional infliction of emotional distress.

E. The Claim for Misrepresentation

The defendant argues that it is entitled to summary judgment on Count III of the complaint because the allegations contained in it are included in Rowell's claim for breach of the insurance contract. It is not clear from the complaint whether the misrepresentation alleged is intentional or negligent, but Rowell states in his argument that both types are alleged. Plaintiff's Opposition at 19.

Both intentional misrepresentation and negligent misrepresentation include as elements of proof reliance and actual damage. *Letellier v. Small*, 400 A.2d 371, 373 (Me. 1979) (intentional misrepresentation or deceit); *Brae Asset Fund, L.P. v. Adam*, 661 A.2d 1137, 1140 (Me. 1995) (negligent misrepresentation). Rowell offers no evidence of either element in his summary judgment materials. Therefore, the defendant is entitled to summary judgment on Count III of the complaint.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment on the counterclaim be **DENIED** and that the defendant's motion for summary judgment be **GRANTED** as to Counts II and III of the complaint and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 27th day of October, 1997.

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David M. Cohen
United States Magistrate Judge